Supreme Court, U.S.
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No. 04-1400

In The
# Supreme Court of the United States

FEDERAL WAY SCHOOL DISTRICT,

*Petitioner,*

v.

M.L., a minor, and C.D. and S.L., his parents,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

JAMES J. DIONNE
*Counsel of Record*
TIMOTHY S. MCCREDIE
EVAN M. SHAPIRO
JEFFREY GANSON
DIONNE & RORICK
900 Two Union Square
601 Union Street
Seattle, WA 98101
(206) 622-0203
*Attorneys for Petitioner*

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## QUESTIONS PRESENTED

M.L. is a severely autistic boy who qualifies for special education services under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (the "IDEA" or "Act"). At the time in question, he was six years old and had a cognitive ability measured at the first percentile, no verbal ability, no toileting skills, and no ability to control his behavior. He transferred into the Federal Way School District (the "FWSD") during the summer of 2000, and began attending a regular kindergarten classroom with the help of a series of one-on-one instructional assistants. M.L. attended school only five days before his parents ("Parents") removed him and kept him out of school for the remainder of the academic year.

The individualized education program ("IEP") team met on November 13, 2000 to review M.L.'s program and placement. Parents refused to attend the meeting. No regular education teacher attended the meeting, although one was appointed to be a member of the IEP team, if needed. Relying on a recently completed reevaluation of M.L.'s educational needs, the IEP team offered to place M.L. in a self-contained special education classroom specifically designed to meet M.L.'s intensive needs. Parents refused the program and placement, and they refused the FWSD's offer to convene another IEP meeting.

The Ninth Circuit, in an opinion by Judge Alarcón, held that failure to have a regular education teacher at the November 13 IEP meeting was a serious violation of the IDEA, which invalidated the IEP and allowed Parents to seek private educational costs from the FWSD. Judge Gould concurred in part and in the judgment. Judge Clifton dissented.

## QUESTIONS PRESENTED – Continued

The questions presented are:

1. Whether a public school district denies a "free appropriate public education" under the IDEA due to a single procedural violation, even though the IEP team developed an appropriate educational program that all educational experts, the administrative law judge, and the district court agreed resulted in the best placement for the student in the least restrictive environment.

2. Whether a public school district violates IDEA procedures that require regular education teacher participation "to the extent appropriate" by proceeding with an IEP meeting without a regular education teacher present, when the totality of circumstances indicated to the IEP team that a regular education teacher was not necessary to design an appropriate educational program and placement.

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## OPINIONS BELOW

The final opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a-66a) in favor of Parents is reported at 394 F.3d 634. The order of the United States District Court for the Western District of Washington granting the motion for summary judgment in favor of Petitioner (App., *infra*, 161a-173a) is unreported. The decision of the Administrative Law Judge ("ALJ") (App., *infra*, 174a-242a) in favor of Petitioner is unreported.

## JURISDICTION

The judgment of the district court was entered on April 30, 2002. The Ninth Circuit issued a decision affirming the district court's judgment on September 2, 2003. App., *infra*, 127a-160a. Parents filed a petition for rehearing on September 12, 2003. The Ninth Circuit issued its second opinion, reversing itself and vacating the district court's decision on November 5, 2004, and entered judgment on that same day. App., *infra*, 67a-126a. After considering Petitioner's rehearing petition and petition for rehearing en banc, the Ninth Circuit on January 14, 2005, entered a final order vacating the district court's decision, amending its second opinion in part, and denying Petitioner's rehearing petition and petition for rehearing en banc. App., *infra*, 1a-66a. The Ninth Circuit entered judgment on January 14, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*, and relevant regulations implementing the Act are set out in an Appendix to this Petition. App., *infra*, 243a-334a.

## STATEMENT

This case raises important, recurring questions relating to how courts review procedural violations of the IDEA and how to interpret the Court's twofold test in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), for evaluating compliance with both the procedural and substantive requirements of the Act.

### 1. The underlying facts

M.L. is severely autistic and has a cognitive ability measured at the first percentile. He is non-verbal, unable to communicate, and not toilet trained. He is also aggressive, unable to control his behavior, and prone to fits of crying, whining, biting, and scratching his instructors and peers when frustrated. App., *infra*, 7a-9a.

Parents moved to the FWSD in the summer of 2000. M.L. initially attended a regular education kindergarten classroom at a FWSD school. The FWSD hired a series of one-on-one instructional assistants to work with M.L., but each quit after working with him for one day. At Parents' suggestion, the FWSD attempted to control M.L.'s behavior by allowing him to listen to music on headphones all day, rather than listen to the class. After only five school days, on September 11, 2000, Parents removed M.L. from

school because they were dissatisfied with the classroom teacher; he did not return for the remainder of the school year. *Id.* at 10a-11a.

Because the FWSD did not believe that M.L.'s former school district had properly evaluated him, the FWSD proceeded to reevaluate him on October 6, 2000. The evaluation included input from M.L.'s regular education teachers from the preschool he attended prior to moving to the FWSD, and from the FWSD's regular education kindergarten teacher. *Id.* at 12a-13a, 145a; SER[1] 351. The evaluation team recommended that M.L. be placed in a special program that was specifically tailored to his needs.

The FWSD held an individualized education program ("IEP") meeting on November 13, 2000, to discuss M.L.'s placement. Parents refused to attend. The IEP team met without Parents and without a designated regular education teacher. App., *infra*, 15a. Consistent with the recently completed evaluation report that was later upheld by both the ALJ and the district court, the IEP team proposed a program in a self-contained special education classroom that the ALJ and district court each found was the "best placement for M.L." *Id.* at 15a; *id.* at 56a (Clifton, J., dissenting).[2] Parents declined this proposed placement even though it was modeled after a University of Washington autism

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[1] References to "SER" are to the FWSD's Supplemental Excerpts of Record filed in the Ninth Circuit.

[2] The district court found that the FWSD's experts "uniformly identified the special education placement at Wildwood Elementary as the superior option, and [Parents] offered no expert testimony in rebuttal." *Id.* at 169a. The ALJ concluded that M.L. "ha[d] no expected opportunity for making meaningful academic progress in the heavily academic, regular education kindergarten classroom. . . ." *Id.* at 238a.

expert's program recommendation for severely disabled children. *Id.* at 215a. In a November 17 letter, the FWSD offered to convene another IEP meeting to listen to any issues Parents chose to raise, but Parents did not respond to this offer. Instead, on January 4, 2001, Parents requested a due process hearing before an ALJ. *Id.* at 16a, 175a, 209a.

**2. The administrative proceedings**

In February 2001, the ALJ conducted an eight-day due process hearing. The ALJ decided as follows: (1) the IEP team was properly constituted; (2) the evaluation the FWSD conducted was proper; (3) the IEP developed by the FWSD was "appropriate and designed to confer educational benefit;" and (4) the IEP team's proposed placement of M.L. in a self-contained classroom provided M.L. with a free appropriate public education ("FAPE"). *Id.* at 223a, 225a, 233a, 240a. The ALJ dismissed Parents' action and denied them their requested remedies.

**3. The district court proceedings**

Parents' appeal of the ALJ's decision focused on two issues: "whether the District complied with the IDEA's procedural requirements in formulating M.L.'s IEP, and whether the IEP developed through those procedures was reasonably calculated to enable M.L. to receive a free and appropriate public education." *Id.* at 164a. The appeal was heard on the administrative record; no new evidence was offered.

After carefully reviewing the relevant statutes, regulations, and case law, the district court affirmed the

ALJ's decision. The court agreed that the FWSD did not violate the procedural requirements of the IDEA, concluding that under the IDEA it was unnecessary to have a regular education teacher at the November 13 IEP meeting because M.L. was new to the school and was not participating in regular education classes at the time of the meeting. *Id.* at 165a-166a. Even assuming that "failure to include a regular education teacher of M.L.'s on the IEP team amounted to a procedural violation of the IDEA, such violation would not necessarily constitute denial of a FAPE." *Id.* at 166a. The court stated that whether the alleged procedural violation resulted in denial of a FAPE "depends on whether or not M.L. suffered a substantive loss of educational opportunity." *Id.* The district court determined that the FWSD "did not significantly deviate from the IDEA's required procedures in formulating M.L.'s IEP and that the IEP developed through those procedures was reasonably calculated to provide M.L. with a free and appropriate education." *Id.* at 172a.

**4. The Ninth Circuit's divided decisions**

On appeal, a unanimous Ninth Circuit on September 2, 2003, issued its first opinion affirming the district court's decision. However, after Parents filed a petition for rehearing, the Circuit Court reversed itself. Two judges ruled against the FWSD but issued significantly divergent opinions; the third judge dissented. The majority ruled the FWSD's procedural violation in failing to have a regular education teacher at a single IEP meeting entirely invalidated the FWSD's proposed IEP and permitted Parents to seek an award of equitable reimbursement for educational costs they incurred in keeping the child out of the public schools.

In his second amended opinion, Judge Alarcón concluded the FWSD committed a procedural violation, reasoning that the IDEA requirement in § 1414(d)(1)(B) that at least "one regular education teacher be included on an IEP team, if the student may be participating in a regular education classroom, is mandatory – not discretionary." *Id.* at 22a. He acknowledged that the Supreme Court has never expressed what impact a procedural violation of the IDEA has on a school district's overall compliance with the IDEA. *Id.* at 24a. He adopted a "structural error" analysis: failure to include a regular education teacher on the IEP team "standing alone, is a structural defect that prejudices the right of a disabled student to receive a FAPE." *Id.* at 32a.[3] Judge Alarcón did not consider the record below, including the ALJ's and district court's findings regarding the appropriateness of the program the FWSD developed for M.L. Instead, he decided the "illegally constituted IEP team" was a "critical structural defect" that, standing alone, precluded the courts "from considering whether the IEP developed without the inclusion of at least one regular education

[3] Judge Alarcón borrows his structural defect analysis from Fourteenth Amendment due process cases involving criminal prosecutions where trial judges provided erroneous jury instructions or wrongly admitted evidence of an involuntary confession. App., *infra*, 28a-32a; *cf. id.* at 42a-43a n.3 & n.4 (Gould, J., concurring). However, this structural defect test flatly contradicts the Ninth Circuit's own long-established principles regarding the educational process. *See Doe v. Maher*, 793 F.2d 1470, 1487 (9th Cir. 1986), *affirmed as modified sub. nom., Honig v. Doe*, 484 U.S. 305 (1988) ("[W]e recognize that education is an art in which all who participate must be accorded some flexibility in their practices and relationships. The due process model of the criminal justice system should not be our guide in fashioning these practices and relationships.").

teacher was reasonably calculated to enable M.L. to receive a [FAPE]." *Id.* at 6a-7a, 32a, 35a n.9.

The majority of the panel adopted a different standard of review, calling it a "harmless error" standard, for evaluating a school district's compliance with the IDEA in the event of a procedural violation. Judge Gould, in his concurrence, agreed that the FWSD violated the procedural requirements of the IDEA, but disagreed with Judge Alarcón's *per se* structural defect analysis that mandates "automatic reversal." *Id.* at 38a-39a. Rather, Judge Gould stated that courts "must assess the school district's error for harmlessness . . . by considering whether the procedural error resulted in a loss of educational opportunity or significantly restricted parental participation in the IEP formulation." *Id.* at 39a. Engaging in an extremely narrow review of the record without deference to the findings and conclusions of the IEP team, educational experts, the ALJ, or the district court, Judge Gould concluded that the failure to have a regular education teacher at the IEP meeting was not harmless due to the "strong likelihood that mainstreaming opportunities for M.L. would have been better considered had a regular education teacher" attended the meeting. *Id.* at 50a. In his tightly constricted scope of review of the record, Judge Gould avoided considering the substantive merits of the educational program the FWSD developed for M.L. He also ignored the fact that the IEP team merely adopted the reevaluation placement recommendation; that evaluation was unchallenged as a legally appropriate evaluation and preceded the alleged procedural error.

Judge Clifton dissented. Although he agreed that the FWSD violated the procedural requirements of the Act by not including a regular education teacher in the November

2000 IEP meeting, he concluded that such failure did not result in the loss of educational opportunity or deny M.L. a FAPE. Unlike Judges Alarcón and Gould, he based his decision on a review of the entire record for clear error, including the IEP the FWSD developed for M.L.[4]

## REASONS FOR GRANTING THE PETITION

This case presents a critically important question of federal law for parents and school districts that this Court has never resolved: how courts should review alleged violations of the IDEA's procedural requirements when the school district fully complied with the IDEA's substantive requirements by providing an appropriate education. This Court in *Rowley*, 458 U.S. 176, established the following twofold test for determining compliance with the Act:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has

[4] Although Judge Clifton decided in favor of the FWSD after considering the substantive impact of the procedural violation, he too felt precluded by *Rowley* from considering "the second *Rowley* question," which asks whether the IEP developed is reasonably calculated to enable the child to receive educational benefits. App., *infra*, 58a n.3. The FWSD agrees with Judge Clifton that the entire record shows no educational harm to M.L. by failing to have a regular education teacher at the IEP meeting. However, the FWSD argues that even if some harm is shown, the court (or ALJ) should balance the educational harm with the proposed educational benefit to determine if the second *Rowley* substantive standard is met.

> complied with the obligations imposed by Congress and the courts can require no more.

*Id.* at 206-07. Applying that test to the facts in *Rowley*, this Court stated that the student's educational program complied with the substantive requirements of the Act, but it could not rule on the school district's procedural compliance because neither the district court nor court of appeals made any findings on that issue. The Court provided no guidance on how to evaluate a school district's compliance with the Act in the event it complied with the substantive provisions of the Act, but not its procedural requirements. Although the issue of a school district's compliance with the procedural requirements of the Act arises in nearly every case where a parent requests a due process hearing, the Court – to date – has not revisited the application of its twofold test in *Rowley* to this question.

Since the *Rowley* decision, courts have struggled to formulate a coherent rule for analyzing cases under the Act where the school district has committed a procedural violation. The Ninth Circuit's decision squarely presents the problem. The panel developed and applied three different tests for evaluating the FWSD's compliance with the IDEA, all of which are contrary to this Court's interpretation of the substantive standard in *Rowley*. The Ninth Circuit's decision below emphasizes form over substance, whereby an appropriate IEP that clearly results in the best placement for the student is invalidated due to a single deviation from the myriad of IDEA procedural requirements. *See O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701 (10th Cir. 1998) (citations omitted) ("[T]echnical deviations from the requirements of section 1401(a)(20) . . . do not render an IEP entirely invalid; to hold otherwise would exalt form

over substance."). The decision continues the regrettable trend of expending public education monies on litigation over technical procedural issues that do not impact the substantive benefits that the IDEA was intended to ensure. In that respect, it makes IDEA litigation more fertile than medical or other professional malpractice cases, since winning plaintiffs may receive substantial attorney fees, 20 U.S.C. § 1415(i)(3)(B), as well as reimbursement for educationally unfounded private services, 34 C.F.R. § 300.403(c). The Ninth Circuit's decision also is contrary to decisions from the Fourth Circuit, which has expressly stated that a school district complies with the IDEA – even in the event of procedural error – if the substantive program the school district developed provided the student with a FAPE.

Moreover, the Ninth Circuit erred in deciding that the FWSD committed a procedural violation, overlooking statutory and regulatory guidance indicating that an IEP team has discretion to decide the extent to which a regular education teacher should participate in a particular IEP meeting. Mandating strict compliance with procedural requirements, as the Ninth Circuit held, is not only confusing in its application to specific circumstances, but is also contrary to *Rowley* and decisions from other circuits.

## I. The decision below reflects widespread uncertainty over the meaning of the twofold standard in *Rowley* as it relates to procedural error under the IDEA, which only this Court can clarify.

### A. The Ninth Circuit's decision failed to express a coherent standard and violated *Rowley* by failing to give proper deference to educators, the ALJ, and the district court decisions.

The Ninth Circuit failed to articulate a coherent rule for evaluating a school district's compliance with the Act, with each of the Ninth Circuit panel judges positing different standards of factual and legal review. The judges differed significantly on the scope of their review of the record below, with none of the judges evaluating the entire record to determine the significance of the procedural violation in light of the substance of the educational program the FWSD developed. The Ninth Circuit's decision below provided no comprehensible guidance to ALJs and district courts about the standard to apply in the event of a purely procedural error, and violated the *Rowley* admonition to give deference to educational decisions, the decisions of the ALJ, and the decisions of the district court.

Judge Alarcón's "structural error" analysis – unsupported by any IDEA-specific case law – provides no direction on the different types of procedural errors that would be subject to structural error analysis. Structural error analysis opens the door for ALJs and district courts to apply this analysis to virtually any procedural violation of the Act.

Judge Gould labeled his standard a "harmless error" review: courts must examine each procedural error "individually – as colored by each case's particular facts – and . . . apply a uniform standard that assesses lost educational opportunity or lost parental participation. . . ." App., *infra*, 46a. Without deferring to the ALJ's and the district court's findings or placing the burden of proof on Parents – the appealing party – to demonstrate harm, he speculated that inclusion of a regular education teacher at the IEP team meeting would have resulted in a different IEP for M.L. *Id.* at 50a. He reached this speculative conclusion after considering only part of the record, emphasizing M.L.'s preschool education experience at the former school district but ignoring its substantive failure to increase M.L.'s basic adaptive functioning skills, downplaying M.L's failure in the regular kindergarten program in September 2000, and totally disregarding the ALJ's and the district court's findings regarding the substance of the educational program the FWSD ultimately developed, which was "the best placement for M.L.. . . ." *Id.* at 50a n.12 (Gould, J., concurring) (quoting Judge Clifton's dissent). Therefore, Judge Gould established a questionable and legally murky standard whereby courts may review only the evidence most favorable to Parents to determine whether a school district complied with the IDEA.

Because of his extremely narrow scope of evidentiary review, which ignored any evidence that did not favor mainstreaming, and because of his reliance on a general preference for mainstreaming[5] that applies to all students,

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[5] Although Judge Gould cited a 1987 article referencing the "'substantial and growing' body of evidence that supports the . . . value of mainstreaming," App., *infra*, 49a, more recent research indicates

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Judge Gould's harmless error analysis is no different, in its application, than the *per se* structural defect analysis of Judge Alarcón. *Id.* at 63a (Clifton, J., dissenting). Inferring that a regular education placement for M.L. was "possible," the majority in effect applied a reasonable doubt or summary judgment-type standard in reviewing the record: if any inferences of "possible harm" could be found in favor of Parents' claims, then that evidence alone required

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mixed, inconclusive results not amenable to generalization. *See generally* Kenneth A. Kavale, Ph.D., *Inclusion: Rhetoric and Reality Surrounding the Integration of Students with Disabilities* (Iowa Acad. of Educ. May 2000) at 20-26 *available at* http://www.finefoundation.org/IAE/iae-z-op-kavale-1.pdf ("The research evidence investigating inclusion clearly suggests caution. There is much that is still not known. . . . Analysis of the evidence also suggests that the effectiveness of practices associated with inclusion are mixed at best. . . . [O]utcomes for special education are not predictable, and students with disabilities may be at risk for potentially adverse consequences with the indiscriminate implementation of a full inclusion policy. . . . Although there is ideological and political support for inclusion, the empirical evidence is less convincing."); Anne P. Dupre, *Disability and the Public Schools: The Case Against Inclusion*, 72 Wash. L. Rev. 775, 813 (1997) (discussing "ideal placement": "In the real world where resources are limited . . . educators must make rationing trade-offs regarding the community of learning."). Judge Gould's one-size-fits-all reliance on mainstreaming preferences also ignores the diagnosis of autism, which in its most severe forms means that M.L. does not learn productive, developmentally appropriate skills in a natural environment. (If he did, he would not be autistic.) *See* Bryna Siegel, *The World of the Autistic Child* 226 (1996); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 70-71 (4th ed. 1994) ("DSM-IV") (citing diagnostic criteria for autistic disorder). Instead, M.L.'s learning is idiosyncratic, with attention drawn to non-salient and non-social environmental stimuli. *See* DSM-IV at 70-71. With very intensive services outside a mainstream environment during the crucial early childhood years, as many as 50% of autistic children may eventually achieve more normal functioning for eventual placement in a regular education classroom. M.J. Guralnick, The Effectiveness of Early Intervention 314, 316 (1996).

reversal of the ALJ's and the district court's decisions. *See id.* at 32a (Alarcón, J.); *id.* at 48a-50a (Gould, J., concurring).

Besides refusing to consider the FWSD's proposed IEP, Judge Gould and Judge Alarcón refused to give any deference to the FWSD's comprehensive evaluation that supported the IEP team's decisions. The evaluation team had already fully considered mainstreaming opportunities for M.L.,[6] including input from M.L.'s former regular education teachers, and recommended that the IEP team provide a special education placement rather than a mainstream one. *Id.* at 12a-13a. A University of Washington autism expert characterized the FWSD's 2000 evaluation of M.L. as one of the most thorough and comprehensive she had ever seen for a child so young. SER 654, 657-58, 662. The ALJ and the district court both found the evaluation appropriate, a finding not challenged by Parents in the appeal to the Ninth Circuit. By refusing to consider the evaluation and past failure of mainstreaming for M.L.,[7]

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[6] Because the FWSD already thoroughly and correctly evaluated mainstreaming opportunities for M.L. before the November 13 IEP meeting (as found by both the ALJ and district court), and the IEP reflected those evaluation results, any potential causation or relevancy connection between the alleged violation (absence of a regular education teacher at the IEP meeting) and possible educational harm from the teacher's absence (better consideration of mainstreaming opportunities) was mooted by the unchallenged educational decisions reported in the reevaluation.

[7] After three years of trying *partial* mainstreaming at another school district's preschool program (approximately seven hours of mainstreaming per week out of twenty-two hours of program services, which also included fifteen hours of extremely restrictive "one-on-one" services, delivered mostly in Parents' home), M.L.'s functioning continued to measure at the lowest possible levels on standardized and functional evaluation measures. SER 45; Wash. Superintendent of Pub.

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the majority failed to consider, much less give deference to, the most relevant and probative facts available to the FWSD IEP team, who believed they had sufficient information to design an appropriate IEP and placement without the presence of a current regular education teacher.

The IDEA requires courts to base their decisions on the "preponderance of the evidence." *See* 20 U.S.C. § 1415(i)(2)(B)(iii). This standard requires "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1182 (6th ed. 1991); *see also N.L. v. Knox County Schs.*, 315 F.3d 688, 692 (6th Cir. 2003) (holding that parents alleging procedural error have burden of proving substantive harm under the IDEA's preponderance standard, which requires courts to make findings based on evidence "contained in the complete record" and does not permit courts to set aside the ALJ's findings unless evidence "more likely than not" indicates the ALJ decision was unjustified).[8] Here, the

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Instruction's Record of Administrative Proceedings at 003020 (Testimony of Wicks); App., *infra*, 8a. During the five days he attended the integrated kindergarten classroom in the FWSD, he failed to participate in any meaningful way. App., *infra*, 10a. Sandy Ramsay, M.L.'s teacher for those five days, made the following observations about M.L.: "[H]is skills are so low . . . that the things that mom wants to see in a program will not be best provided in this academic based "K" class. . . . I have never had such a low functioning student in all my 11 years in Spec. ed. . . ." SER 351.

[8] This Court recently accepted review of another IDEA case involving the burden of proof at the administrative hearing level. *See Schaffer v. Weast*, 377 F.3d 449 (4th Cir. 2004), *pet. for review granted*, 125 S. Ct. 1300 (Feb. 22, 2005).

Ninth Circuit majority erred in basing its judgment on a "possibility of regular education placement," a kind of criminal law reasonable doubt standard, rather than the IDEA's "more likely than not" preponderance standard. App., *infra*, 29a (Alarcón, J.) (quoting *Doyle v. United States*, 599 F.2d 984, 995-96 (Cl. Ct. 1979), amended on other grounds by 609 F.2d 990 (Cl. Ct. 1979), and *Chapman v. California*, 386 U.S. 18, 22, 24 (1967), that "a conviction will be upheld if the 'federal constitutional error . . . was harmless beyond a reasonable doubt.'"); *id.* at 50a n.12 (Gould, J., concurring) (concluding error was not harmless because "regular education for M.L. [was] a distinct possibility").

### B. The Ninth Circuit disregarded this Court's interpretation of the IDEA in *Rowley*.

By failing to consider the educational benefits offered by the IEP, or the legally appropriate evaluation recommendations on which the offered IEP was based, the Ninth Circuit violated this Court's interpretation of the Act in *Rowley*. Congress enacted the IDEA to assist state and local agencies, financially, in educating students with disabilities, the majority of whom received no services from school districts. Because Congress "open[ed] the door of public education" to so many more students, it did not "guarantee any particular level of education once inside." *Rowley*, 458 U.S. at 192. The Act only required school districts to identify disabled children and provide them with access to education "sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. In finding against the FWSD due to one procedural violation where the FWSD developed an IEP that resulted in the best placement for M.L., the Ninth Circuit disregarded

this Court's statements in *Rowley* regarding the purpose of the Act.

Although the Court in *Rowley* acknowledged the importance of school districts' compliance with the procedural requirements of the Act, the Act's procedures are not an end unto themselves. The objective of those procedures is to ensure substantive compliance with the Act. *Id.* at 206 (noting "the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"). The Ninth Circuit lost sight of the purpose of the procedural safeguards when it failed to consider the FWSD's substantive compliance with the Act through its comprehensive evaluation of M.L.'s needs and the appropriate IEP offer based on that evaluation. In essence, the Ninth Circuit improperly adopted an IDEA analog to criminal law jurisprudence: if the school erred procedurally, the substantive merits need not be considered.[9]

The Ninth Circuit's decision also violates the Court's requirement in *Rowley* that courts defer to the decision of educators and to the state administrative process. The Ninth Circuit gave *no consideration* to either. *Rowley* states that courts should not "substitute their own notions

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[9] In criminal law, even if the substantive evidence is tainted by a procedural violation (*e.g.*, "fruits of the poisonous tree"), the courts allow consideration of the evidence if a party can show an untainted, independent source. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). In this case, the FWSD evaluation recommendation for a special education placement was untainted by any procedural violation – its appropriateness is unchallenged – and yet the Ninth Circuit precluded consideration of that untainted evidence to show the appropriateness of the FWSD placement decision.

of sound educational policy for those of the school authorities which they review," and must give "due weight" to the state proceedings. *Id.* at 206. Professional educators developed an IEP for M.L. that the ALJ and district court determined resulted in the best placement for M.L. By accepting Parents' argument that a procedural violation negated the substantive decisions of the FWSD when it developed an appropriate IEP for M.L., the Ninth Circuit disregarded the requirement of deference to educators. Additionally, the Ninth Circuit failed to defer to the "specialized knowledge and experience" of the ALJ when it ignored her finding that the FWSD complied with the substantive requirements of the Act. *See id.* at 208.

### C. The Ninth Circuit's decision is contrary to decisions from the Fourth Circuit.

Due to the absence of clear guidance from this Court on the application of the *Rowley* twofold test, a clash among the circuits has developed regarding whether courts should consider a district's substantive compliance with the Act when there is a procedural violation. In direct conflict with the Ninth Circuit's decision below, the Fourth Circuit addresses the second *Rowley* question even when there is a procedural error under the first *Rowley* step.[10]

[10] Other circuits have reached equally varied conclusions as the three Ninth Circuit panel judges in their decisions below regarding the appropriate standard of review in these cases. Rarely have courts analyzed procedural violations of the IDEA under Judge Alarcón's *"per se"* approach. In fact, courts frequently cite to only one decision, *Jackson v. Franklin County School Board*, 806 F.2d 623, 628-29 (5th Cir. 1986), as support for the *"per se"* approach. *See, e.g., Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 n.24 (5th Cir. 2003); *Doe v. Alabama State Dep't of Educ.*, 915 F.2d 651, 662 n.11 (11th Cir. 1990). The

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The Fourth Circuit in *DiBuo v. Board of Education of Worcester County* addressed the question of "[w]hether a procedural violation of the IDEA can support a finding that a school district failed to provide a disabled child with a FAPE when the procedural violation *did not actually interfere* with the provision of a FAPE to that child." 309 F.3d 184, 190 (4th Cir. 2002). The school district in *DiBuo* conceded that the IEP team failed to consider Parents' request, which was supported by professional evaluations, that the student receive extended school year ("ESY") services. *Id.* at 187. Despite this procedural error, the ALJ examined the district's proposed IEP and determined it provided the student with a FAPE because the evidence did not establish that ESY services were needed. *Id.* at 187-88.

The Fourth Circuit agreed with the ALJ's analysis and held that "a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE before the child and/or his parents would be entitled to reimbursement relief. . . ." *Id.* at 190-91; *see also Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997) ("[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education,

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vast majority of circuits have evaluated the factual circumstances surrounding the procedural error to determine harm. *See* App., *infra*, 44a n.6 (Gould, J., concurring) (citing numerous decisions from other circuits). Yet, those courts differ on the scope of their review of the factual record and on whether to consider the procedural violation in light of the substantive educational program the school district developed to determine compliance with the Act. None of the courts, however, adequately analyzed the issue presented by the decision below.

these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education."). The Fourth Circuit's approach, in contrast to the Ninth Circuit's, requires courts to examine the substance of the IEP to determine whether the school provided the student with a FAPE despite committing a procedural violation.

## II. This case raises an important, recurring question of statutory construction regarding regular education teacher participation in the IEP process.

### A. The Ninth Circuit's decision disregards the IDEA's plain language and nullifies legislative intent.

Reversing the district court, the Ninth Circuit ruled the FWSD violated 20 U.S.C. § 1414(d)(1)(B) by not having a regular education teacher present at the IEP meeting on November 13, 2000. Section 1414(d)(1)(B)(ii) provides that the "individualized education program team" ("IEP team") includes "at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)." Construing § 1414(d)(1)(B) in a vacuum, the Ninth Circuit failed to harmonize that section with another more relevant statutory provision (§ 1414(d)(4)(B)) and legislative history that explains how the regular education teacher requirement is to be implemented by school districts on a meeting-by-meeting basis.

Section 1414(d)(4)(B) of the Act provides that "[t]he regular education teacher of the child, as a member of the IEP team, shall, *to the extent appropriate*, participate in the review and revision of the IEP of the child." 20 U.S.C.

§ 1414(d)(4)(B) (emphasis added). The Act's legislative history explicitly clarifies that § 1414(d)(1)(B)'s requirement that a regular education teacher be a member of the IEP team must be analyzed in concert with the flexible participation standard found in § 1414(d)(4)(B). The House and Senate Reports proposing the 1997 IDEA amendments describe the interplay between these two provisions:

> Very often, regular education teachers play a central role in the education of children with disabilities. In that regard the bill provides that regular education teacher participate on the IEP Team, *but this provision is to be construed in light of the bill's proviso that the regular education teacher, to the extent appropriate, participate in the development of the IEP of the child. The Committee recognizes the reasonable concern that the provision including the regular education teacher might create an obligation that the teacher participate in all aspects of the IEP Team's work. The Committee does not intend that to be the case and only intends it to be to the extent appropriate.*

H.R. Rep. No. 105-95, at 103 (1997); S. Rep. No. 105-17, at 23 (1997) (emphasis added).[11]

The FWSD did not violate the plain meaning of § 1414(d)(1)(B), which merely requires inclusion of a regular education teacher on the IEP team. As the Ninth Circuit conceded, the FWSD in fact *included* a regular education

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[11] The relevant section of H.R. Rep. No. 105-95 (1997) is included in the Appendix to this Petition. *See* App., *infra*, 317a-332a. The section titled "Evaluations, eligibility determinations, IEPs, and placements section 614" from H.R. Rep. No. 105-95 is identical in substance to S. Rep. No. 105-17, at 17-25 (1997).

teacher on the IEP team prior to the November 13 meeting. App., *infra*, 34a (Alarcón, J.) ("[A]lthough the FWSD named a regular education teacher to be a member of the IEP team, she did not attend the November 13, 2000 meeting."); *id.* at 49a (Gould, J. concurring) ("[T]he FWSD had appointed a regular education teacher to the IEP team, but inexplicably went forward with the IEP planning meeting without that teacher's presence and participation."). Under a plain language approach, the judges' conclusion that a teacher was named to the IEP team should have ended their analysis under § 1414(d)(1)(B).

In contrast to this simple plain language approach to interpreting § 1414(d)(1)(B), the Ninth Circuit erroneously analyzed whether § 1414(d)(1)(B) was violated as a result of the IEP's team decision to proceed with the November 13 meeting without the regular education teacher. The issue of the teacher's absence from the meeting was more appropriately governed by § 1414(d)(4)(B), which requires a regular education teacher to *participate* in the IEP process to the extent appropriate. Although the Ninth Circuit briefly cited to § 1414(d)(4)(B), it failed to analyze the FWSD's compliance under this statute. The Ninth Circuit's failure to give effect to § 1414(d)(4)(B) is directly contradictory to both the plain language of the statute and the IDEA's legislative history.

### B. The Ninth Circuit's decision contradicts Department of Education regulations directly on point.

When there are ambiguities in the IDEA, courts defer to the constructions and interpretations of the Department of Education's Office of Special Education Programs ("OSEP"), the agency charged with monitoring, administering, and

enforcing the IDEA. *See Cedar Rapids Comm. Sch. Dist. v. Garrett F.*, 526 U.S. 66, 75 n.6, 78 n.10 (1999) (rejecting a judicially-created test in light of its discrepancy with the Department of Education regulations governing the IDEA); *Honig v. Doe*, 484 U.S. 305, 325 n.8 (1988) ("Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute."); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-92 & n.9 (1984) ("We begin with the regulations of the Department of Education, which are entitled to deference."). Exercising its authority in 1999 after the IDEA amendments of 1997 were enacted, the OSEP promulgated regulations interpreting § 1414(d)(1)(B) and (d)(4)(B), which created new requirements for regular education teacher participation on the IEP team. 64 Fed. Reg. 12,406, 12,440-41 (March 12, 1999).

OSEP regulations confirm the IDEA's crucial distinction between IEP team membership and IEP meeting attendance. In response to concerns that regular education teacher participation at every IEP meeting would "interfere with the ability of regular education teachers to provide the necessary instruction to all children in their classrooms, both with and without disabilities," *id.* at 12,582-83, OSEP adopted a flexible approach that left it up to school districts and parents to determine regular education teacher participation on a case-by-case basis, not a blanket rule requiring attendance at all meetings:

> Whether the child's regular education teacher must be physically present at an IEP meeting, and to what extent that individual must participate in all phases of the IEP process, are matters that must (1) be determined on a case-by-case basis by the public agency, the parents, and other members of the IEP team, and (2) be based on a variety of factors.

*Id.* at 12,583. OSEP further explained: "[T]he teacher need not (depending upon the child's needs and the purpose of the specific IEP team meeting) be required to participate in all decisions made as part of the meeting or to be present throughout the entire meeting or attend every meeting." 34 C.F.R. pt. 300, app. A, Question 24.

Contrary to this OSEP guidance, the Ninth Circuit did not distinguish between the strict standard requiring a regular education teacher on the IEP team with the more flexible, case-by-case (and meeting-by-meeting) standard for whether a regular education teacher must participate in a particular IEP meeting. The Ninth Circuit failed to consider any circumstances regarding the regular education teacher's absence from the November 13 meeting, and whether it was an abuse of discretion for the IEP team to proceed with the meeting without the teacher. Instead, the majority focused on only one factor: whether "mainstreaming opportunities for M.L. would have been better considered had a regular education teacher taken part." App., *infra*, 50a (Gould, J., concurring); *cf. id.* at 36a (Alarcón, J.) (finding "inherently harmful impact").

Judges Alarcón and Gould applied their own "structural defect" and "harmless error" tests, respectively, instead of applying OSEP's flexible approach that requires analysis of whether the IEP team made an educationally reasonable decision to proceed with the November 13 IEP meeting without a regular education teacher. Applying OSEP's flexible approach and examining the "specific circumstances" unique to this student's IEP meeting of November 13, 2000, the FWSD clearly had a rational basis to proceed with the meeting without a regular education teacher present. Their professional educational decision to

proceed with the IEP meeting deserved the deference of the Circuit Court.

### C. Applying the correct standard, the FWSD did not violate the IDEA by proceeding with the IEP meeting.

The regular education teacher's failure to participate in the IEP meeting was "appropriate" under § 1414(d)(4)(B) and consistent with OSEP's flexible approach. At the time of the November 13 IEP meeting, it was unlikely, due to his severe disabilities, that M.L. could benefit from placement in a regular classroom, or that his behaviors would not harm or disrupt the education of the other students. The FWSD's thorough and complete evaluation concluded that he needed the intensity of a self-contained program to meet his severe needs. As Judge Clifton noted in dissent: "Anything is possible, but it is highly unlikely that including a regular education teacher on the IEP team would have resulted in a recommendation that M.L. be placed in a regular kindergarten classroom." App., *infra*, 63a.

Parents could also have easily attended the IEP meeting and requested the attendance of a regular education teacher; instead, they boycotted the meeting. Parents were even offered another IEP meeting to review or revise the IEP and further discuss placement options in a November 17, 2000 letter; instead they declined another meeting.[12] App., *infra*, 209a; SER 436. The IEP team

[12] Scheduling IEP meetings is more difficult than the Ninth Circuit recognized when it held that the IEP team should have canceled the November 13 IEP meeting because one member did not attend. Teachers unexpectedly miss work – perhaps more than others because of the pupil population they serve – due to personal illness, emergencies, bereavement

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members did not need a regular education teacher to better inform their own opinions; and Parents did not attend to offer a contrary opinion for the IEP team to consider. Therefore, the IEP team did not err when they did not cancel the IEP meeting on November 13, 2000.

### D. The Ninth Circuit's decision conflicts with *Rowley*.

Contrary to *Rowley*,[13] the Ninth Circuit took a "carte blanche" approach,[14] ignoring § 1414(d)(4)(B), its legislative

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leave, family leave, and other leaves. *See* Wash. Rev. Code 28A.400.300. They also use after-class time for grading papers and planning curriculum for the rest of the week. Meetings must also be scheduled to accommodate parents' needs. Here, Parents argued that Father's employer required ten days advance notice to excuse Father from work to attend the meeting. The District scheduled the November 13 IEP meeting thirteen days in advance. App., *infra*, 203a-208a. To cancel the meeting and then have to reschedule another meeting with appropriate advance notice to Parents would have resulted in the District violating the regulatory duty to have an IEP meeting within thirty days after an evaluation. 34 C.F.R. § 300.343(b)(2). "Strictness [in the IEP process] must be tempered by considerations of fairness and practicality. . . ." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990).

[13] Though *Rowley* did not involve procedural compliance, as a matter of statutory interpretation, the legal problem in *Rowley* was similar to the issue in this case: Because Congress did not clearly define what constitutes an "*appropriate* education," the courts were left to construe whether the standard was the best or potential-maximizing education, or something less rigorous, *i.e.*, an education reasonably calculated to confer some educational benefit. 458 U.S. at 197-98, 203. Here, the issue is construing what standard applies to regular education teacher participation "to the extent *appropriate*." See 20 U.S.C. § 1414(d)(4)(B). Therefore, what *Rowley* decided in construing "appropriateness" for substantive requirements informs the analysis of whether the extent of participation by the regular education teacher is "appropriate" under the IDEA's procedural requirements.

[14] In *Rowley*, this Court ruled that the undefined phrase "appropriate education" must be construed by examining the language of the Act

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history, and Department of Education interpretation. Instead of applying the flexible, case-by-case approach and deferring to the IEP team's discretion, as directed by the Department of Education, on whether a regular education teacher must attend a particular meeting, the Ninth Circuit used its own overly simplistic bright-line test: If there is no regular education teacher at an IEP meeting, the IEP is entirely invalid. Nor did the Ninth Circuit apply the "adequate procedural compliance" standard *Rowley* established; it instead applied a "strict compliance" or "best possible compliance" standard. *Cf. O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 705-06 (10th Cir. 1998) (holding that where the IDEA and regulations fail to require particular level of specificity in statement of annual goals in IEP, "general" and uninformative goals nevertheless met *Rowley*'s "adequate compliance" standard). The Ninth Circuit majority simply imposed their own views about what is "appropriate participation" by the regular education teacher, essentially deciding that a maximum participation standard applied here because there was some very remote "possibil[ity] that M.L. would be placed in a regular education classroom." App., *infra*, 32a. (Alarcón, J.); *see id.* at 49a (Gould, J., concurring).

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and its legislative history, rejecting the dissenting approach that "would give the courts *carte blanche* to impose upon the States whatever burden their various judgments indicate should be imposed." 458 U.S. at 190, n.11.

## CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES J. DIONNE
*Counsel of Record*
TIMOTHY S. MCCREDIE
EVAN M. SHAPIRO
JEFFREY GANSON
DIONNE & RORICK
900 Two Union Square
601 Union Street
Seattle, WA 98101
(206) 622-0203
*Attorneys for Petitioner*